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IN THE

Supreme Court of the United States

October Term, 1959

No. 912

JOSEPH MANFREDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN TF

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph Manfredi prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 8, 1960.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. This opinion is set forth as an Appendix hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on March 8, 1960. On April 6, 1960, Mr. Justice John M.

Harlan granted an order extending the time of petitioner to file his petition for a writ of certiorari to and including May 6, 1960. The jurisdiction of this Court is invoked under Title 28, United States Code, ¶1254(1).

Questions Presented

The following questions are presented in this case as to this petitioner.

1. Whether there was sufficient evidence as a matter of law to connect petitioner with the conspiracy alleged in the indictment in this case, where all of the testimony of the government's witnesses related only hearsay as to petitioner, and there was no showing of his knowing and wilful participation in any narcotics transactions or conspiracy.

2. Whether there is a conflict between the decision of the Court of Appeals for the Fifth Circuit in the case of *Panci* v. *United States*, 256 F. 2d 308 (1958), and the case at bar; and whether this Court should resolve this conflict, especially in light of the statement in the opinion of the Court of Appeals in this case, "that we do not wholly approve of *Panci*."

Statutes Involved

Title 21, United States Code

Section 173—Importation of Narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures:

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its

control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

* * * * *

Section 174—Same; Penalty, evidence:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.

Statement of the Case

The Indictment

The indictment in this case contained 13 counts. Counts 1 through 11 inclusive alleged sales of illicit narcotic drugs by either Victor DeSerra or Victor Euphemia and Frank Correggio, or Victor Euphemia alone, for the period be-

tween March 4, 1957 and June 11, 1957. Count 12 alleged the sale of one-fourth kilogram of heroin on July 31, 1957, by Victor Euphemia and Pasquale DeLuca; this was the only substantive count in which DeLuca was named.

Count 13 alleged, in usual language, a conspiracy to sell narcotics among Victor Euphemia, Frank Correggio, Joseph Manfredi, Pasquale DeLuca and Victor DeSerra, which commenced on or about March 4, 1957 and continued allegedly "to and including the date of the filing of this indictment", which was January 23, 1959, although the last date of any overt act pleaded (or proved) was July 31, 1957.

The Record

The record in this case before the Court of Appeals consisted of an Appendix filed on behalf of petitioner Joseph Manfredi and co-defendant Pasquale DeLuca, who is separately filing a petition for a writ of certiorari in this Court. This Appendix has been certified and is submitted to this Court for use with this case, and 9 copies thereof have been filed with this Court for like use. The government did not file any separate appendix.

The Trial

The only persons tried on this indictment were petitioners Joseph Manfredi and Pasquale DeLuca. The co-defendants Victor Euphemia, Victor DeSerra and Frank Correggio each pleaded guilty to the counts in which each was named.

The government's proof in support of the trial of Manfredi on Count 13 and DeLuca on Counts 12 and 13, was the testimony of government agents and one so-called

"special employee" or informer-type witness. The agent-witnesses were Stephen F. Giorgio (34a-47a),[1] Daniel D. Moynihan (48a-72a), Edward T. Coyne (73a-80a), Anthony Mangiaracina (81a-105a, 132a-134a), Lee Bennett (110a-115a), Leonard Schrier (116a-125a, 129a), and William Wong (134a-138a). The informer-witness was Charles Papalardo (138a-145a).

At the close of the government's direct case, on motion of DeLuca's attorney, Count 13 (the conspiracy count) was dismissed as to him by the trial judge (168a-175a). Thereupon both defendants rested without offering any direct proof, and the case was submitted to the jury for its verdict on the remaining counts. The jury convicted each of the petitioners of the counts which were submitted to it, that is, Count 12 as to DeLuca, and Count 13 as to Manfredi.

The Facts

At the outset of this statement of facts it should be pointed out that petitioner Manfredi is not connected in any way to any of the narcotics transactions alleged in the substantive counts of the indictment, nor by anything he is supposed to have said or done to aid, abet or facilitate any of these narcotic transactions. His connection with the conspiracy alleged in the indictment is based upon hearsay statements of co-defendants not on trial with him and upon the fact that he was observed to be in the company of these others, and on several occasions to have received money or what appeared to be money from these others. This preliminary statement is made so that the following

[1] All numbers in parentheses refer to pages in Appellants' Appendix, unless otherwise indicated.

statement of fact can be read and considered in proper perspective of the role of petitioner Manfredi in this case.

Moreover, the opening statement of the prosecutor to the jury has been reprinted in the appendix so that the Court can relate the allegations and theory of the prosecutor to the facts which were adduced by the testimony of the government's witnesses. See pages 20a-34a. As to Manfredi, the government contended that he was "the nerve center of the narcotic activity in this indictment, the defendant Jojo Manfredi"[2] (31a). The entire case revolves about this allegation, that the tranactions were "the way the Manfredi organization operates", or "that a new man, or a runner for Manfredi might make the delivery (of narcotics)", or "that Jojo Manfredi was his (Euphemia's) connection" (32a-33a). Since none of these allegations were proved by any evidence admissible against Manfredi, it is clear that it was the atmosphere of a narcotics trial which aided in the conviction of Manfredi. The statement of the facts proved on this trial shows this clearly.

Agent Giorgio testified that on the occasions of March 4, March 14, March 21, March 28 and April 11, 1957, he made purchases of narcotics from co-defendant Victor DeSerra (34a-47a). These transactions were observed by various agents of the Bureau of Narcotics. Agent Moynihan followed DeSerra after the March 4, March 14, March 21 and March 28 transactions. He observed him to go to East Harlem on each occasion, a section of New York reputed to be one of the worst narcotics centers in the United States.

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[2] The prosecutor continually referred to petitioner as "JoJo", and several of the government witnesses testified that Euphemia called his supplier "JoJo", but petitioner never acknowledged that appellation and there was no proof in the record that he used that nickname.

In detail Moynihan testified that on March 4, 1957, after DeSerra sold narcotics to Agent Giorgio, he followed DeSerra to the vicinity of East 109th Street and Second Avenue. There DeSerra entered a bar on the northwest corner. Moynihan did not follow him into the bar. After DeSerra left the bar he walked to East 108th Street between First and Second Avenues, where he met Manfredi. Together they entered Manfredi's restaurant in that street. In the restaurant DeSerra and Manfredi were seen to be talking together. There were six other men in the place. Moynihan watched from the outside of the restaurant. After DeSerra and Manfredi talked together, DeSerra left and walked back to the bar at Second Avenue and East 109th Street, known as Leo's Bar, where DeSerra entered and Moynihan's testimony for this date ended. All of this occurred at about 8 to 9 o'clock at night (49a-51a). There was no other observation made by any agents of DeSerra's meeting with Manfredi that night. Although Moynihan did not testify with respect to this fact, nevertheless the informer-witness, Papalardo, testified that on March 4, he accompanies DeSerra to Leo's Bar at Second Avenue and East 109th Street, after the sale was made to Agent Giorgio, where DeSerra and he had a drink and DeSerra said "I have got to go see my connection" (141a), whereupon he left.

Moynihan testified that on March 14, 1957, he followed DeSerra from the same subway station where all of the Giorgio transactions took place, to Manfredi's Restaurant on East 108th Street, arriving there before DeSerra, and he observed DeSerra greet Manfredi. They conversed and then they went into the restaurant. This was at about 9:40 o'clock at night. Moynihan remained outside. Through the

window Moynihan saw DeSerra give Manfredi money, after which DeSerra left (52a-53a). The conversation between Manfredi and DeSerra was not overheard.

As to March 21, 1957, after 8 p.m., Moynihan testified that again he followed DeSerra to East Harlem. DeSerra was in a taxicab on this trip. DeSerra alighted at East 109th Street and Second Avenue. He walked to the social club just off that corner, then he went back to Second Avenue and south to East 108th Street, then to Manfredi's Restaurant. Five minutes later he returned to the corner of East 109th Street, where a few minutes later he was joined by Manfredi. Together they walked to the social club, and as they were east of the intersection DeSerra gave Manfredi money, which Manfredi counted before placing in his pocket (53a-54a).

On March 28, 1957, Moynihan again followed DeSerra to East Harlem, in the vicinity of 334 East 110th Street, which is not the Manfredi luncheonette. There DeSerra met an "unidentified man", not Manfredi on this occasion (55a).

On cross-examination, Moynihan testified that on looking into the Manfredi restaurant, although it was nighttime on each occasion, he looked through the glass doors (68a). With respect to his seeing DeSerra giving money to Manfredi on the March 14 and March 21 meetings, he testified first that "It appeared to me to be money" (71a), and then, "I didn't say I saw the money clearly. I said I saw what I believe to be money" (72a). Moynihan was then asked:

> "Q. Could it have been anything else? A. Yes, it could have been."

On March 14, 1957, Agent Coyne testified that he was in a government vehicle on East 109th Street between First and Second Avenues, and while parked at about 7:30 p.m., he observed Manfredi approach the Veteran's Social Club, where he met DeSerra. They conversed for a short time and then Manfredi left (73a-74a).

With respect to the March 28, 1957 meeting between Manfredi and DeSerra, Agent Coyne testified that at about 8 p.m. he followed DeSerra to the Manfredi Restaurant, where from the corner of East 108th Street he observed DeSerra meet Manfredi and saw them talk for a short time. Then, Coyne continued "I walked into the block, and as I passed them Manfredi was counting money and he placed it in his pocket" (75a). Coyne did not say he saw DeSerra give Manfredi this money. Moreover, Coyne followed DeSerra as he left the subway station at East 28th Street, and observed him make two stops, first at 2019 First Avenue where he entered at 7:30 p.m. and left at 8 p.m., then at 334 East 110th Street, where he met a man and talked for 10 to 15 minutes, after which he went to meet Manfredi (75a).

Agent Wong testified that he entered Manfredi's restaurant on March 21, 1957, at about 8:10 p.m., where he observed "Victor" and Manfredi in conversation. As he entered the conversation stopped, so he bought some gum and cigarettes and left (135a-137a).

There was no other testimony respecting any meetings between DeSerra and Manfredi. There was no testimony at all concerning the substance of any conversation between these two men, and there was no showing as to the purpose or reason for DeSerra giving any money to Manfredi, or

whether it was government "marked" money advanced for the purpose of identifying a seller of illicit drugs. Manfredi was not arrested with respect to this case until February 15 or 16, 1959 (1a), but his connection with DeSerra apparently ended, insofar as testimony on this trial is concerned, with the March 28, 1957 transaction. Although DeSerra was indicted and pleaded guilty to Count 11, concerning a sale of narcotics to Agent Giorgio on April 11, 1957, no evidence concerning this transaction and DeSerra's meeting Manfredi on this occasion was introduced (See pp. 45a-47a).

The remainder of the testimony offered against Manfredi concerns Euphemia meeting him on various occasions. Most of it relates to co-defendant Victor Euphemia's conduct and what Euphemia said to Agent Mangiaracina about "JoJo" and the "Manfredi organization" on the occasions of their meetings and transactions. As to these other co-defendants, with whom Manfredi is alleged to have conspired in this case, Victor Euphemia, Frank Correggio and Pasquale DeLuca, the remaining evidence details the transactions of Euphemia and Correggio with Agent Mangiaracina and one transaction where Euphemia used appellant Pasquale DeLuca's automobile to accomplish a delivery of narcotics to Mangiaracina. This latter transaction is not at all connected to Manfredi.

Agent Mangiaracina, who had evidently made contact with Euphemia as a supplier of narcotics, testified as to events beginning with March 28, 1957. On this occasion he met Euphemia in the vicinity of Lexington Avenue and East 86th Street, Manhattan, at about 3:10 p.m. (81a). They drove in Euphemia's car to East 117th Street be-

tween Second and Third Avenue, where they picked up co-defendant Frank Correggio and then they drove on to the Bronx. At 1900 Longfellow Avenue, Euphemia stopped the car and had Correggio "go upstairs and get the big package" (82a). Then the agent and Euphemia went into the building and waited there until Correggio came down, handed Euphemia a package, which Euphemia handed to Mangiaracina who gave him $315 government funds (83a). This package contained illicit narcotics.

Agent Schrier followed Euphemia and Mangiaracina on that date, and as they left 1900 Longfellow Avenue, Mangiaracina walked to the subway, while Euphemia and Correggio got into Euphemia's car and they drove west on Tremont Avenue. Schrier lost them in traffic, but later after driving over to Bruckner Boulevard, half-way down toward Manhattan, he stopped, parked his car and waited. After being parked for five minutes, he observed Euphemia's car with Euphemia along in it. He followed him to East Harlem and saw him drive into a service station at East 108th Street and First Avenue. Then, after the car was serviced, Euphemia parked it on East 108th Street between First Avenue and the Drive. Then he walked to the corner of East 108th Street and First Avenue, and stood in front of the funeral parlor on that corner. Five minutes later Manfredi walked up to Euphemia and they shook hands, had a short conversation and then Euphemia gave Manfredi some money which he pocketed. They continued to talk for ten minutes after which they separated. Then Manfredi went into a candy store on First Avenue, north of East 108th Street. When he came out a car drove up and he spoke to a man named Frank Luciano. After

this conversation Manfredi walked towards his restaurant where he was seen occasionally to walk in and out of the restaurant. An hour later, at about 7 o'clock p.m., Manfredi came out and drove off in his car. Schrier followed him. He drove first to First Avenue and East 116th Street, across 116th Street to Second Avenue, then down Second Avenue to East 96th Street, where he stopped in front of a luncheonette at that corner. A woman came out and talked to him in the car for about 5 minutes. Then as the woman got out a young man entered his car and they drove off (117a-120a).

The trial judge interrupted the testimony as to these observations with a comment as to their relevancy, and thereupon the prosecutor switched his question to a later date, at which the judge commented: "Then there is no use in having all this material" (120a).

On April 4, 1957 Mangiaracina met Correggio (83a-84a); then on April 8 he met Euphemia, after which they drove and another person, Angelo Dominici, was driving Euphemia's car. They drove to East Harlem, and at East 119th Street and First Avenue, Euphemia stopped to make a phone call. Then he returned to the car and they drove on to 1900 Longfellow Avenue in the Bronx. Euphemia and the agent left the car and Dominici drove away. In the building they went to Correggio's apartment and met him there. Then as they left Euphemia gave the agent a package of narcotics and received $315 government funds for it (85a- 87a). No meeting between Euphemia and Manfredi was held on this occasion.

On April 10, 1957, Mangiaracina and Euphemia met and had a conversation (87a). During this conversation Euphe-

mia said his "connection" was "JoJo from 108th Street" (88a). On April 17, they met again and discussed "JoJo" again (89a-90a). No visit by Euphemia to Manfredi was made on these occasions although there was at least one delivery of drugs and payment therefor, and these meetings were held under the observation of other government agents (121a). On May 9 and 10 there were meetings again between Euphemia and the agent (90a-92a), during which "JoJo" was discussed. These meetings also were observed by other agents (122a).

On May 14, 1957, Mangiaracina met Euphemia at East 86th Street and Lexington Avenue and together they went uptown on a Third Avenue bus so that Euphemia could point out "JoJo" to Mangiaracina (93a). Euphemia left the agent at East 108th Street and Second Avenue and was then observed by other agents to walk to Manfredi's resaurant (122a). There was no testimony that he met Manfredi on this occasion. When he returned to Mangiaracina after a "short time" (93a) he explained what "JoJo" had "said" about the delivery of narcotics (93a-94a). Manfredi was not seen on this occasion (94a).

On June 5, 1957, they met again and this time Euphemia was going to introduce Mangiaracina to "JoJo's brother" (95a), "as JoJo was down in Florida on vacation" (95a). Together they went up to East 108th Street, at Mangiaracina's suggestion, to meet "JoJo's" brother. Euphemia left the agent again at Second Avenue and East 108th Street and returned saying that the brother would deliver a quarter kilo of heroin at 10 o'clock that night (96a). Euphemia was observed by Agent Schrier to go to Manfredi's restaurant and after being inside for about five minutes, he returned to Mangiaracina (123a). Then at

about 9:30 p.m. Euphemia, Dominici and Mangiaracina met and they travelled by taxicab to East 108th Street and First Avenue to meet "JoJo's" brother (96a). Euphemia left Dominici and the agent at East 107th Street and First Avenue. When he returned he said that "JoJo's" brother was not around and that the candy store and social club were closed. Agent Schrier observed that Euphemia walked to the Manfredi restaurant, which was closed; he spoke to someone in front of the place who was not known to Schrier (123a).

On June 11, 1957, Euphemia again met Mangiaracina and they arranged to have the delivery of the narcotics made at the Longfellow Avenue address (98a). Euphemia said he would have to go to East 108th Street to see "JoJo" to arrange for a delivery (99a-100a). They arranged to meet at East 80th Street and Lexington Avenue, which they did at about 5 p.m. Then Euphemia said that he would have to go back to "JoJo" to confirm the order (100a) They then arranged to meet at 8 o'clock at East 86th Street and Lexington Avenue. They met and, together then, they travelled by subway to the Bronx. On the way they had the following conversation:

> "Q. Tell us about that conversation. A. Euphemia on the subway suggested I purchase an automobile. . . . On this car I should have mounted underneath one of the rear fenders a steel box which he said the Manfredi organization has.
>
> So I asked him, 'Who is Manfredi?'
>
> He said, 'That's the guy you have been doing business with'" (100a).

At Longfellow Avenue Euphemia delivered narcotics to the agent (101a).

On this date, Agent Schrier was on a roof at East 108th Street observing Manfredi who was sitting in front of his restaurant (124a). At about 420 p.m. Euphemia arrived and had a conversation with Manfredi which lasted about five minutes. Also on this date Agent Moynihan observed Euphemia and Mangiaracina meet at about 5:15 p.m. at East 86th Street and Lexington Avenue, after which Euphemia travelled by taxicab to East 108th Street and Third Avenue, then to Manfredi's restaurant where Moynihan stated that Euphemia entered and spoke to Manfredi "in my presence" (56a). The conversation was not related.

On June 25, 1957, Euphemia met Mangiaracina at East 86th Street and Lexington Avenue at about 3 p.m. (102a). Euphemia said he would call "JoJo" and then arranged to meet the agent at 8 p.m. At 9:30 p.m., after Euphemia had failed to show up, Mangiaracina telephoned him at a number he had given, and the person answering the telephone said that Euphemia had gone to the Bronx "because the neighborhood was hot" (103a).

On June 26, 1957, Agent Schrier observed Mangiaracina meet Euphemia at 3 p.m. at East 86th Street and Lexington Avenue (124a). Then Euphemia left and travelled by taxicab to East 108th Street and Third Avenue. He then walked to the Manfredi restaurant, spoke to some men in front, but did not enter it. Schrier followed him to 239 East 115th Street where he entered the building remaining there 10 or 15 minutes. Then he walked to East 116th Street near Second Avenue where he spoke to a man named Joseph Bisogno who had driven up in a car (124a). Ten minutes later Euphemia walked back to East 108th Street where he was seen talking to Manfredi in the middle of the block between First and Second Avenues.

This ended all of the testimony concerning Manfredi and Euphemia and the others. Motions to strike all of the testimony as to Manfredi as inadmissible hearsay and for failure to connect it to him were denied by the trial judge. In his summation the prosecutor treated Manfredi as a knowing participant, as the key figure or head of the narcotics conspiracy alleged in the indictment, notwithstanding the failure by the government to make any connection by Manfredi's own words or deeds to the alleged conspiracy (190a-203a).

It should be noted that at the time he was being sentenced, along with all the other defendants in this case, Euphemia stated to the Court:

> "From what I heard though my attorney about De-Luca and Manfredi, it was never true. Them guys got nothing to do with me" (235a).

Reasons for Granting the Writ

The reasons for granting the writ of certiorari in this case relates to the ever recurring problem in federal trials as to the sufficiency of evidence as a matter of law to connect a criminal defendant with a criminal conspiracy alleged against him, where all of the testimony of the government's witnesses constitutes only hearsay, thus making the evidence of his alleged participation in the crime charged based purely on circumstantial evidence and inferences to be drawn from meetings with persons themselves engaged in criminal activity. Subdidiary to this fundamental policy question is the resolution of a conflict between the Court of Appeals for the Fifth Circuit and the Court of Appeals for the Second Circuit in this case, as to

the proper standard of proof required to charge a criminal defendant with knowing and willful participation in a criminal conspiracy. Thus the supervisory function exercised by this court over the administration of federal criminal justice is once again called upon to be exercised. See *Bruno* v. *United States*, 308 U. S. 287; *McNabb* v. *United States*, 318 U. S. 332; *Marshall* v. *United States*, 360 U. S. 310.

1. There was no sufficient credible evidence as a matter of law connecting petitioner Manfredi with the conspiracy alleged in the indictment herein. The detailed analysis of the testimony of the various government agents and the informer witnesses clearly show that the record of trial is absolutely devoid of any credible evidence against Manfredi which connects him in any way with the conspiracy alleged in the indictment. The best that can be said for the government's proof is that petitioner, engaged in operating a restaurant or candy store in East Harlem, knew, met with, spoke with, and, on several occasions, received what the agents believed to be money, from two persons independently engaged in the sale of narcotics to different government agents. Taken at face value, this is the entire case against petitioner Manfredi.

However, to supplement this very weak case, the government offered in evidence, statements atributed to Euphemia that "JoJo from 108th Street" was his "connection" (88a); that he had to see "JoJo" to arrange for the delivery (99a-100a); that Manfredi is "the guy you have been doing business with" (100a). This evidence, patently hearsay, was received against Manfredi "subject to connection", without any limiting instruction on the part of the

trial court. The government's theory was that these conversations were admissible against Manfredi as statements made by a co-conspirator during the course of and in furtherance of a conspiracy. However, to be admissible as such it was necessary first to establish by other independent credible evidence Manfredi's knowing and willful participation in such conspiracy; and absent such proof these statements remain incompetent and inadmissible hearsay. *Glasser* v. *United States*, 315 U. S. 60, 74; *Panci* v. *United States*, 256 F. 2d 308, 311 (C. A. 5). In the *Glasser* case, this court stated:

> "However, such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there was proof aliunde that he is conected with the conspiracy."

In the *Panci* case, *supra*, Chief Judge Hutcheson wrote as follows:

> "We agree with the appellant that, under the rule established and prevailing in this court, it was error to overrule his objections to the hearsay testimony of the Giardinas, and that it was error on this record not to direct a verdict in his favor. In Montford v. United States, 5 Cir., 200 F. 2d 759, 760, this court thus correctly laid down the rule governing the trial of cases, where, as here, it was sought to *prove a defendant's connection with a conspiracy or his complicity in a crime by the hearsay statements and declarations of persons named or charged as co-conspirators or accomplices, but not otherwise proven to be such.*
>
> "The declarations of one conspirator made in furtherance of the objects of the conspiracy, are ad-

missible against all members of the conspiracy. Logan v. United States, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429. But a defendant's connection with a conspiracy cannot be established by the extra-judicial declarations of a co-conspirator, made out of the presence of the defendant. There must be proof aliunde of the existence of the conspiracy, and of the defendant's connection with it, before such statement becomes admissible as against a defendant not present when they were made. Glasser v. United States, 315 U. S. 60, 74, 62 S. Ct. 457, 86 L. Ed. 680, 701; Minner v. United States, 10 Cir., 57 F. 2d 506; May v. United States, 84 U. S. App. D. C. 233, 175 F. 2d 994; United States v. Nardone, 2 Cir., 106 F. 2d 41, reversed on other grounds 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307.

Under that rule we think it clear beyond question that the admission of the hearsay testimony fatally impregnated the case with prejudicial and reversible error. In addition, with this evidence excluded and eliminated from the record, the case was completely circumstantial and there was no evidence pointing, with the degree of clarity required for conviction in such cases, to appellant's guilt. It was error, therefore, not to direct an acquittal and because of this error the judgment must be reversed with directions to acquit." (Emphasis in original.)

The *Panci* case was a narcotics case. The indictment there alleged 9 counts, involving 3 separate narcotic transactions, and the usual conspiracy count. The testimony against Panci consisted of observations by government agents that they observed Panci meet with Giardina on several occasions, and on one occasion that Panci passed a small brown paper bag behind his back to Giardina. Giardina was the co-defendant who pleaded guilty in this case,

and the brown paper bag ostensibly contained narcotics although there was no proof of this fact.

What is essentially missing from the government's proof in this case is proof of knowledge on the part of Manfredi as to the activities of DeSerra and Euphemia in selling narcotics and of his knowing participation in those activities. As was stated in *United States* v. *Ah Kee Eng*, 241 F. 2d 157, 159:

> "Having failed to adduce any evidence of Eng's knowledge of the conspiracy and willingness to join such a conspiracy, all the other evidence was improperly admitted."

Without this proof of knowledge and willingness to join such a conspiracy on the part of Manfredi, the hearsay statements of Euphemia and the narcotic drug evidence were improperly received against him. As it has been stated over and again "Those having no knowledge of the conspiracy are not conspirators." *United States* v. *Falcone*, 311 U. S. 205, 210; *United States* v. *Bonanzi*, 94 F. 2d 570, 572 (C. A. 2d); *United States* v. *Peoni*, 100 F. 2d 401, 403 (C. A. 2d).

The government contends, and it was the theory advanced on the trial, that proof of Manfredi's knowledge and participation can be sustained circumstantially by the facts that DeSerra gave him what appeared to be money on several occasions after making narcotic sales, and that Euphemia did so on one such occasion; also that there were the meetings with Manfredi at his restaurant or in the neighborhood, at various times on days when narcotics transactions were consummated or attempted. Then the atmosphere of the narcotics trial adds its influence to help

convict this petitioner because of his acquaintance and apparent friendship with the co-defendants as to whom the evidence of criminality is conclusive.

Actually what is lacking in this theory is evidence from which guilt can be inferred. "The test is whether, taking the evidence in the view most favorable to the government, there is substantial evidence to support the verdict. *United States* v. *Manton*, 107 F. 2d 834, 839." *United States* v. *Tutino*, 269 F. 2d 488, 490. What is lacking here is such substantial evidence, for the government assumes the subject matter of Manfredi's meetings and talks with DeSerra and Euphemia to be narcotic transactions, and the giving of money to him to be for the same purpose. But there is no proof of such purpose.

Even if Manfredi ostensibly knew that DeSerra and Euphemia were enagaged in narcotics transactions (as to which there is no proof) nevertheless such knowledge is insufficient to make him a conspiratorial party to such transactions, unless there is proof that he knowingly joined such conspiracy. The receipt of money and the several talks between Manfredi and the others is not proof of such knowledge and willful activity. The Court of Appeals for the Second Circuit held in *United States* v. *Pelz*, 54 F. 2d 1001, 1005 that:

> "There must be proof of an unlawful agreement and participation therein *with knowledge of the agreement.*" (Emphasis supplied)

In *United States* v. *Koch*, 113 F. 2d 982, 983 (C. A. 2d), it was stated:

> "It is necessary to the government's case to show that the appellant was in some way knowingly asso-

ciated in the unlawful common enterprise to import the drugs and dispose of them unlawfully."

In *Cleaver* v. *United States*, 238 F. 2d 766, 771 (C. A. 10th), the Court stated:

> "Mere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy, without an intention and agreement to cooperate in the crime is insufficient to constitute one a conspirator."

The record here discloses no evidence of the vital fact: Manfredi's knowing and willful participation in any criminal conspiracy. The so-called suspicious circumstances of Manfredi's meetings, on the street or in his restaurant, with DeSerra and Euphemia, is also not evidence of conspiratorial conduct. *United States* v. *Di Re*, 332 U. S. 581, 583; *United States* v. *Carengella*, 198 F. 2d 3, 7; *United States* v. *Peoni*, *supra*, 402; *United States* v. *Williams*, 341 U. S. 58, 64, footnote 4; *Hicks* v. *United States*, 150 U. S. 442; *United States* v. *Stromberg*, 268 F. 2d 256, 267.

In the *Di Re* case, this court, by Mr. Justice Jackson, wrote:

> "An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow

> that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged from mere meetings" (332 U. S. 581, 593).

In the *Carengella* case, *supra*, the Court of Appeals for the Seventh Circuit held as follows:

> "Tenerelli's further testimony that Blandi made inquiry as to police inquiries was not binding upon Di Vito or Carengella who were not present. As to Blandi, it does no more than arouse the suspicion that he had a guilty conscience about something, but it takes something more than a robust suspicion to convict a defendant in a criminal case. United States v. Wainer, 7 Cir., 170 F. 2d 603, 606. Association with guilty men may create suspicion, but it is not evidence of sufficient weight to convict under the statute in question. United States v. O'Brien, 7 Cir. 174 F. 2d 341, 345. We think the judgments against Di Vito and Blandi must be reversed."

Accordingly, it is submitted that the government has failed to prove Manfredi's knowing and willful participation in the conspiracy alleged in the indictment. This case typifies the comment of Judge Learned Hand in *United States* v. *Falcone*, 109 F. 2d 579, 581:

> "So many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

In *Krulewitch* v. *United States*, 336 U. S. 440, 445-446, Mr. Justice Jackson had this to say about the indiscriminate use of the conspiracy indictment:

> "This case illustrates a present drift in federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggest that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice" (336 U. S. 440, 445-446).

It can be fairly said that in this case the use of the concept of conspiracy against Manfredi is the extreme example of such use, and that this Court should reject its use under the facts of this case.

2. It is apparent that there is a material conflict between the decision of the Court of Appeals for the Fifth Circuit in the case of *Panci* v. *United States*, 256 F. 2d 308 (1958) and the case at bar; and that this Court should resolve this conflict, since it presents an important question involving the uniform administration of federal criminal justice. Circuit Judge Medina in his opinion in this case stated:

> "Moreover, while the result in *Panci* seems sound enough, we think it time to say that we do not wholly approve of *Panci*. See *United States* v. *Brown*, 2 Cir., 1956, 236 F. 2d 403. See also 55 Col. L. Rev. 549 (1955)."

The *Panci* case, set forth at length *supra*, stands for the proposition that a defendant's connection with a criminal

conspiracy must be proved by substantial evidence. Chief Judge Hutcheson wrote with emphasis when he stated:

> "But a defendant's connection with a conspiracy cannot be established by the extra-judicial declarations of a co-conspirator made out of the presence of the defendant. There must be proof aliunde of the existence of the conspiracy, and of the defendant's connection with it, before such statement becomes admissible as against a defendant not present when they are made (citing cases)."

This appears clearly to be the correct statement of the law and should be followed in deciding the conflict between the circuits.

Judge Medina stated in his opinion that "While the evidence of Manfredi's participation in the conspiracy was circumstantial, we think it clearly supports the verdict. The jury evidently believed the testimony of the government agents and drew such inferences from the facts established by such testimony as it was within their exclusive province to draw." The statement of facts, *supra*, supports rather, the argument of petitioner that the jury was permitted to speculate as to the participation of petitioner in the criminal conspiracy set forth in the indictment. And the mere allegation of "narcotics conspiracy" seems enough to have prejudiced petitioner in the minds of the jury.

The important thing here is the conflict between these two circuits of the views as to the proper proof requirements of a circumstantial evidence case. It is this conflict which should be resolved by this Court.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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May 4, 1960

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 266—October Term, 1959.

(Argued February 1, 1960 Decided March 8, 1960.)

Docket No. 26011

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH MANFREDI and PASQUALE DELUCA,

Appellants.

Before:

MEDINA and WATERMAN, *Circuit Judges,* and MADDEN, *Judge,* United States Court of Claims.*

Appeal from judgments of the United States District Court for the Southern District of New York. Richard A. Levet, *Judge.*

Joseph Manfredi appeals from a judgment of conviction of conspiracy to violate the narcotics laws, 21 U. S. C. Sections 173 and 174, and Pasquale DeLuca appeals from a judgment of conviction of a substantive violation thereof. Affirmed.

* Sitting by designation.

STEPHEN E. KAUFMAN, Assistant United States Attorney, New York, N. Y. (Thomas D. Edwards and Gideon Cashman, Assistant United States Attorneys, and S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, New York, N. Y., on the brief), *for appellee.*

DANIEL H. GREENBERG, New York, N. Y. (Vincent J. Velella, New York, N. Y., on the brief), *for appellant, Joseph Manfredi.*

ARNOLD D. ROSEMAN, New York, N. Y. (Harry Silver, New York, N. Y., on the brief), *for appellant, DeLuca.*

MEDINA, *Circuit Judge*:

Joseph Manfredi and Pasquale DeLuca, together with Victor Euphemia, Joseph DeSerra and Frank Correggio were indicted for conspiracy to violate the narcotics laws. The indictment also contained a number of substantive counts against the various defendants other than Manfredi, who was named only in the conspiracy count. Euphemia, DeSerra and Correggio pleaded guilty before trial but did not testify. At the close of the prosecution's evidence the conspiracy count was dismissed as to DeLuca. Manfredi and DeLuca rested without further proof, and the case went to the jury on the conspiracy count against Manfredi and on a substantive count against DeLuca, charging him with receiving, concealing, selling and facilitating the transportation, concealment and sale of ¼ kilogram of heroin on July 31, 1957. Both were found guilty

by the jury. Manfredi was sentenced to seven years and DeLuca to five years imprisonment. Both appeal and they have been released on bail fixed by the trial judge at $35,000 and $15,000 respectively.

As each appellant challenges the sufficiency of the evidence to support his conviction and claims that a verdict of acquittal should have been directed as to him, we shall in due course summarize the proofs and dissuss the various points urged as a basis for reversal.

The Case Against Manfredi

Chronologically the case starts with a sale of 431 grains of heroin by DeSerra to Agent Stephen F. Giorgio of the Bureau of Narcotics on March 4, 1957 on the uptown subway platform of the Lexington Avenue subway at 28th Street and Fourth Avenue in New York City. The scene of actual deliveries of heoin will shift to an apartment occupied by the Correggios at 1900 Longfellow Avenue in the Bronx and to the neighborhood of 86th Street and Lexington Avenue. There was a final delivery of ¼ kilo of heroin by Euphemia to Anthory Mangiaracina, another Agent employed by the Bureau of Narcotics, for $2500 in an automobile in front of the Ten Pin Tavern on Westchester Avenue in the Bronx on July 31, 1957, but doubtless in a commendable endeavor to keep the proofs against the two defendants separate, and for the protection of DeLuca after the dismissal of the conspiracy count against him, Judge Levet instructed the jury that the evidence of the July 31, 1957 transaction could only be considered against DeLuca and that the rest of the evidence could be considered against Manfredi alone, despite the fact that, assuming a finding

of the existence of a conspiracy and Manfredi's participation, the jury would have been entitled to consider against Manfredi the testimony concerning the July 31, 1957 transaction.

Manfredi or his wife owned a combination candy store and luncheonette on East 108th Street, between First and Second Avenues. The direct proof of Manfredi's participation in the conspiracy relates to what a considerable number of government agents saw him do, either in the candy store or in front of it or driving in a new 1957 Oldsmobile with New Jersey plates, or walking in the streets in the vicinity of the candy store. The relationship between the various sales of large quantities of heroin and Manfredi was matter of infcrence to be made after piecing together the testimony of various agents, who dealt with or watched DeSerra and Euphemia, with the testimony of other agents, located either on the roof of a building across the street from the candy store or on foot or in automobiles, who kept Manfredi under surveillance. When once the sequence of dates is understood and the coordination of the testimony of the various agents is made, the application of the law to the facts as the jury must be assumed to have found them is simplicity itself. Accordingly, we shall review the evidence of Manfredi's participation solely with the view of determining whether, disregarding the declarations and acts of DeSerra and Euphemia, there was sufficient basis for a finding by the jury that there was a conspiracy in the traffic of narcotics and that Manfredi knowingly participated in this conspiracy. The direct proof of the sale and purchases of narcotics was obviously competent and it was relevant and necessary to establish the existence of the conspiracy.

In a carefully prepared, thorough and lucid charge Judge Levet instructed the jury that Manfredi's "connection with the conspiracy cannot be established by the acts or declarations of other defendants in his absence," that it "must be established by evidence as to his own conduct, what he himself said or did"; and that only after finding that a conspiracy existed and that Manfredi was a knowing participant therein could the jury consider acts and statements of other members of the conspiracy in his absence.

The case is further simplified by the fact that no testimony was given by the other defendants who had pleaded guilty. And the number of sales of substantial quantities of heroin for large sums of money by DeSerra and Euphemia could scarcely leave any doubt in the mind of anyone familiar with this record that a widespread conspiracy in the traffic in narcotics existed. The real question was whether there was proof of Manfredi's participation, which his counsel vigorously denied.

Immediately after the sale of heroin to Giorgio on March 4, 1957 DeSerra and Papalardo went in a taxi to Leo's bar at 109th Street and Second Avenue where they remained for a few minutes. DeSerra then walked east on 108th Street, Manfredi came along in the Oldsmobile, passed DeSerra, parked the car and both came back and entered the candy story. Agent Daniel D. Moynihan saw them from 25 feet away. They talked together but neither spoke to any of the six other persons in the store. If money passed Moynihan did not see it, as DeSerra was facing in the other direction toward Manfredi.

The next sale of heroin by DeSerra to Giorgio was on March 14, 1957. Again he went directly to Leo's bar and from there to 108th Street, where Manfredi was standing

on the steps in front of the candy store. Manfredi went into the store followed by DeSerra and they conversed. This time DeSerra was facing Moynihan who saw him give money to Manfredi, who put the money in his pocket. DeSerra left without speaking to anyone else. Between March 4 and March 14 DeSerra and Manfredi were frequently seen in the neighhorhood of the candy store but did not speak to one another.

On March 21, 1957 there was another sale of heroin by DeSerra to Giorgio, this time double the previous quantity and he received $750. DeSerra went to 109th Street and Second Avenue in a cab, started to walk east toward a social club near the corner, then turned back, walked south to 108th Street, then east to the candy store. He kept walking around until he was joined by Manfredi. When inside the candy store they saw Agent William Wong coming into the store and they left. As they walked up the street together Moynihan saw DeSerra hand money to Manfredi, who counted the money and put it in his pocket.

On March 28, 1957 there were two sales of heroin by different men in widely separated parts of the city and each promptly returned to Manfredi and handed him money. DeSerra made another sale to Giorgio in the subway at 7:15 P.M. and shortly after 8 o'clock Agent Edward T. Coyne saw DeSerra arrive at the candy store where Manfredi was standing outside. They spoke for a time and as Coyne walked past the candy store Manfredi was counting money which he placed in his pocket.

On the same day, March 28, Agent Anthony Mangiaracina made a purchase of heroin from Euphemia and the delivery and payment therefor were made in front of the apartment

house where the Correggios lived at 1900 Longfellow Avenue in the Bronx. Mangiaracina and Euphemia had met in the street at 86th Street and Lexington Avenue and, after picking up Correggio in a candy store at 117th Street between Second and Third Avenues, Euphemia drove the three of them up to the Bronx in an Oldsmobile. Immediately after the delivery of the heroin and after Mangiaracina walked off in the direction of the subway, Agent Leonard Schrier in his car followed Euphemia in the Oldsmobile to the gas station at 108th Street and First Avenue and Euphemia parked his car. Euphemia stood for about five minutes in front of the funeral parlor on 108th Street and after about five minutes Manfredi came along. Schrier saw Euphemia counting money which he handed to Manfredi and Manfredi put it in his pocket without counting it. Euphemia then got back in the Oldsmobile and drove away.

Against the background of furtive conduct that we have thought it not necessary further to describe in detail, and having in mind that Manfredi when asked by the government agents in DeSerra's presence denied he knew DeSerra, we think the evidence was more than sufficient to warrant a finding that Manfredi knowingly participated in the conspiracy. Thus the jury was justified in considering the other testimony concerning the acts and declarations of DeSerra, Euphemia and Correggio in furtherance of the conspiracy, and also the testimony of Mangiaracina concerning the long drawn out preliminaries leading up to the large ¼ kilo transaction of July 31, 1957, as well as the conduct of Euphemia and DeLuca on that day. The instruction to the jury that the testimony relating to the sale of ¼

kilo of heroin on July 31, 1957 "is not to be considered in any respect with regard to the defendant Manfredi" was more favorable to Manfredi than the law required. We shall return to this subject when discussing DeLuca's points.

As is usual in conspiracy cases we are asked to hold the evidence insufficient on the basis of certain comments in well known cases that are cited to us again and again. We refer to *Glasser* v. *United States*, 1942, 315 U. S. 60; *Krulewitch* v. *United States*, 1949, 336 U. S. 440, and especially *Panci* v. *United States*, 5 Cir., 1958, 256 F. 2d 308. There are many others cited in the briefs. But the fact situations in these cases do not even remotely resemble that disclosed by the present record. It is idle to talk of convictions based on mere suspicion or guilt by association or the circumstance that there is here no proof that marked bills were used in making payment for the deliveries of narcotics and no marked bills were proved to have been in Manfredi's possession. This is not that kind of a case; and we find more than mere suspicion and association with evil character. Moreover, while the result in *Panci* seems sound enough, we thing it time to say that we do not wholly approve of *Panci*. See *United States* v. *Brown*, 2 Cir., 1956, 236 F. 2d 403. See also 55 Col. L. Rev. 549 (1955).

While the evidence of Manfredi's participation in the conspiracy was circumstantial, we think it clearly supports the verdict. The jury evidently believed the testimony of the government agents and drew such inferences from the facts established by such testimony as it was within their exclusive province to draw. Manfredi had a fair trial and the judgment against him is affirmed.

The Case Against DeLuca

Throughout the trial at the very proper insistence of counsel for Manfredi and DeLuca evidence of acts and declarations of alleged co-conspirators, chiefly DeSerra and Euphemia, were received subject to connection and a motion to strike. After the trial judge had dismissed the conspiracy case against DeLuca and had ruled that he would permit the jury to pass upon the conspiracy charge against Manfredi and to pass upon the substantive charge against DeLuca in connection with the ¼ kilo sale on July 31, 1957, the time arrived for counsel to make appropriate motions to strike or for specific instructions to the jury with respect to the evidence that the jury was entitled to consider against each defendant. The trial judge said:

> "Now, you may want to make some motions with resect to the testimony and I would like you to be as specific as possible about that."

Before we examine the colloquy that followed, and the ruling that was affirmatively approved by trial counsel for both Manfredi and DeLuca, it will be helpful to an understanding of DeLuca's claim that he did not have a fair trial if we briefly set forth DeLuca's contentions:

(1) That the testimony received in support of the conspiracy count so poisoned the atmosphere of the trial as to prejudice DeLuca and that nothing the trial judge could have said or done could have prevented the jury from considering the testimony, especially that relating to Euphemia's declarations concerning Manfredi, in its deliberations on the subject of the guilt or innocence of DeLuca.

(2) That the pre-trial motion for a severance should have been granted.

(3) That part of the testimony of Mangiaracina, to the effect that on the way to the subway to go to the Ten Pin Tavern on July 31, 1957 he asked Euphemia who DeLuca was, and Euhemia replied "He is one of Manfredi's runners," was part of the testimony permitted to be considered by the jury against DeLuca. As this point was not presented to the trial judge we assume that this argument is addressed, as are others on behalf of DeLuca, to our inherent powers under Rule 52(b) of the Federal Rules of Criminal Procedure.

(4) That the Bill of Particulars was insufficient and misleading.

(5) That the instructions to the jury were "formidably one-sided" and contained "not a word of presentation of DeLuca's defense."

(6) That the evidence against DeLuca was wholly insufficient to support a conviction.

I

It is now settled law in this Circuit that where several defendants are indicted jointly, all charged with conspiracy and one or more charged with various substantive offenses in the same general subject matter, and the conspiracy count is dismissed as against one or more of the defendants at the close of the prosecution's evidence, instructions to the jury with respect to the evidence to be considered by them against a particular defendant or defendants will be deemed

a sufficient safeguard of the rights of such defendant or defendants "in the absence of bad faith on the part of the government in bringing the conspiracy count," or some special circumstance of an extraordinary and unusual character. See *United States* v. *Schaffer*, 2 Cir., 1959, 266 F. 2d 435. The theory behind this ruling is that: "It is fundamental to the jury system that they will be presumed to follow the court's charge and to limit their consideration to the evidence which may be properly applied against each defendant where more than one defendant is on trial." *United States* v. *DeFillo*, 2 Cir., 1958, 257 F. 2d 835, 839, and cases cited.

Where it is claimed that the conspiracy charge against a particular defendant was made in bad faith or that some other extraordinary circumstance makes it impossible to proceed against such defendant without prejudice to his rights, the proper procedure is to move for a mistrial as to such defendant. No such motion was made by DeLuca in this case. Moreover, we find in the record no basis whatever for any contention that there was bad faith of any kind on the part of the prosecution.

We have examined the record before Judge Dimock on he motion for a severance and nothing therein discloses any abuse of discretion.

II

DeLuca's other points on the subject of a fair trial are so interrelated that it will be convenient to treat them together. As mentioned above, after the dismissal of the conspiracy count against DeLuca, the trial judge suggested that motions relative to the evidence should be made "as

specific as possible." The testimony of Mangiaracina concerning the conversation with Euphemia in which Euphemia had said DeLuca was one of Manfredi's runners had been received subject to a motion to strike. No such motion was made nor did counsel for either Manfredi or DeLuca pursue the trial court's suggestion relative to motions of a specific character, or motions of any character at all. Instead, a colloquy ensued relative to "the testimony that relates to DeLuca's substantive count" and the prosecutor informed the court that this was testimony by Mangiaracina and Bennett, also a very small part of the testimony of Schrier. Accordingly, and in what we think was clearly an endeavor to protect DeLuca's rights and eliminate possible prejudice to him arising out of the testimony against Manfredi on the conspiracy charge, the trial judge ruled "on behalf of DeLuca":

> "I will instruct the jury to disregard all the testimony except Bennett's, and Mangiaracina's testimony which related to the episode itself, and Schrier's testimony relating to the episode itself."

Counsel for DeLuca made no objection to this. But there was more to follow. Judge Levet, in what might perhaps have been an excess of caution, decided further to protect DeLuca's right by instructing the jury that, just as the testimony against Manfredi was not to be considered against DeLuca so also "by the same token any testimony against DeLuca is to be disregarded as against Manfredi." The court continued:

> "This is in accord, I assume, with your position. Is that correct?

Mr. Kove: Yes, sir."
Mr. Roseman: Yes, sir."

It is apparent, we think, that the trial judge intended by this ruling to exclude from the consideration of the jury the conversation related by Mangiaracina to the effect that Euphemia said DeLuca was one of Manfredi's runners. And we believe the later instructions, in almost the same words, were understood by the jury to eliminate from their consideration against DeLuca all the incidental matter in the nature of declarations of Euphemia and other alleged co-conspirators. This particular conversation had obviously been received solely for its bearing on the conspiracy count and that had now been dismissed as to DeLuca.

But, if there were any doubt about the meaning of the instruction thus submitted to counsel for their approval, in the absence of the jury, why did not counsel for DeLuca raise the point by specific motion? We think the reason is plain enough; the instruction proposed was so favorable both to Manfredi and to DeLuca that counsel for each immediately gave his assent. From Manfredi's standpoint the jury was to be instructed to disregard some of the most damaging testimony in the case against him, that relating to the sale of ¼ kilo of heroin for $2500 on July 31, 1957. If the law were to be strictly applied the jury were entitled to consider against Manfredi the declaration of Euphemia that DeLuca was one of Manfredi's runners, once the jury had first concluded that a conspiracy existed and Manfredi was a member of it. The elimination as to Manfredi of all the testimony concerning what occurred on July 31 was a distinct advantage. From DeLuca's standpoint the cleavage between the two defendants was now complete and his

counsel had only to deal with the proof of the sale and delivery of the ¼ kilo of heroin on July 31, 1957.

As a further indication that the point now under discussion wholly lacks substance it is worthy of comment that no request for instructions was made on the subject of Euphemia's declaration; that the summary of the evidence to be considered against DeLuca made by the trial judge in his instructions to the jury made no reference to this declaration; and that at the conclusion of the charge no exception was noted on this point and no request for further instructions submitted. We think the jury gave this declaration no consideration whatever in their deliberations on the subject of DeLuca's guilt or innocence and that, in any event, the point was waived.

While on this subject we may as well dispose of the claim that the charge was "formidably one-sided" and gave a long recital of the evidence against DeLuca without "a word of presentation of DeLuca's defense." This contention is most unfair to a conscientious and careful judge who was doing everything in his power to avoid prejudice to DeLuca from the evidence left in the case against Manfredi on the conspiracy count. The summary of the testimony of Mangiaracina and Bennett and Schrier on the subject of "the July 31st episode," with quotations from the testimony of Mangiaracina and Bennett, was by way of explanation of the testimony the jury were to consider against DeLuca, to make sure that as against DeLuca the jury would give no consideration to the other testimony in the case. Judge Levet thought it best to be specific about what he meant by his reference to "the testimony of Mangiaracina and Bennett, and part of Schrier with respect to the episode of

July 31st"; and when he had concluded his summary of the evidence against DeLuca, the trial judge added, "I think that is all the testimony on that." Moreover, counsel for DeLuca in his summation had said: "if there is any dispute as to what was said, please have Judge Levet ask the court reporter to read that particular testimony that was offered against the defendant DeLuca."

DeLuca did not testify, nor did he call any witnesses. We are at a loss to determine what was the so-called defense the trial judge is supposed to have been under a duty to describe to the jury. As to credibility and the inferences to be drawn from the testimony, the instructions were unexceptionable and also were to the effect that these were matters exclusively within the function of the jury to decide. The suggestion in counsel's brief that the ¼ kilo of heroin had been "planted" in DeLuca's car had been argued in summation and we think it was clearly within the discretion of the trial judge to mention this argument or to say nothing about it.

III

What was the testimony of Mangiaracina, Bennett and Schrier concerning the episode of July 31? Was it sufficient to make out a case against DeLuca on the substantive charge of receiving, selling, concealing, buying, or in any manner facilitating the transportation, concealment or sale of a narcotic drug in violation of 21 U. S. C. Sections 173 and 174?

Schrier merely testified that he saw Mangiaracina and Euphemia together at 86th Street and Lexington Avenue on July 31, 1957 and that at about 8 o'clock in the evening

they went into a drug store and stayed there about five minutes.

Mangiaracina testified that he met Euphemia at that time and place, and told Euphemia he had enough money to buy ¼ kilo of heroin if he could deliver it that evening. They went into a drug store and Euphemia entered a phone booth, leaving the door open. Mangiaracina noticed that Euphemia dialed TA 2-9192 which was the telephone number of the Ten Pin Tavern on Westchester Avenue in the Bronx. Mangiaracina heard Euphemia address the person on the other end of the telephone as Scarpa and Euphemia said "Ten minutes, give us half an hour to get up there." DeLuca admitted later to one of the agents that he was known as Scarpa. At some places in the transcript this name is spelled Scop and, evidently as a stenographic error Starpa. DeLuca was the bartender at the Ten Pin Tavern.

Mangiaracina and Euphemia then took the subway to Buhre Avenue station in the Bronx. On Westchester Avenue Euphemia told Mangiaracina to wait and he went into the Tavern. A few minutes later Euphemia came out. Mangiaracina joined him and they walked north up Westchester Avenue. Euphemia told him the heroin was in the 1956 black Oldsmobile standing in front of the Tavern. So they walked back to the Tavern and Euphemia said: "When we get in, open all the windows. In case we are chased we will throw the package out of the car." Euphemia then unlocked the car and they both got in. Euphemia said, "The package is in the glove compartment, take it out and hold it in your lap." Mangiaracina did so and handed Euphemia $2500. Euphemia then drove Mangiaracina to the subway station.

In the meantime, Agent Lee Bennet had followed Mangiaracina and Euphemia. He saw them walking north on Westchester Avenue, passed them walking in the opposite direction and, as he reached the Ten Pin Tavern he saw DeLuca outside the Tavern, "I saw him take two or three steps away from the door, peering north in the direction Euphemia and Agent Mangiaracina had taken." He noted the license number of the 1956 black Oldsmobile, 2C7252, and it was registered in DeLuca's name as owner. Bennett later was around the neighborhood on many occasions and saw DeLuca driving this car.

We think this evidence was sufficient to take the substantive count against DeLuca to the jury.

After the evidence was closed counsel for DeLuca raised the point that the Bill of Particulars stated that DeLuca's acts of receiving, concealing, selling and facilitating the transportation, concealment and sale of narcotics occurred "within and in front of" the Ten Pin Tavern and made no mention of the automobile. We think it clear that no prejudice resulted from this alleged omission to give more ample details of what the government expected to prove. Moreover, as held by Judge Levet, the point was raised too late and had been waived.

Affirmed.